ABDUL FATTAH MOGAWAN & ANOR

v.

MMC POWER SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN JC
[CIVIL SUIT NO: S2-22-347-1996]
11 AUGUST 1997

CIVIL PROCEDURE: *Costs - Security for costs - Whether discretionary - Whether can be ordered as of right from foreign plaintiffs - Rules of the High Court 1980, O. 23 r. 1(1)*

WORDS & PHRASES: *"Ordinarily resident" and "resident" - Rules of the High Court 1980, O. 23 r. 1(1)(a)*

The plaintiffs had filed several claims against the defendants for damages, for alleged breach of contract by the defendants in failing to provide air tickets for the foreign workers, that were selected by the plaintiffs from Phillippines. The defendants having put in their defence, filed an application seeking security for costs and a stay of the proceedings, until such security was provided. Their contention was that, the plaintiffs were not ordinarily resident in Malaysia and having no assets in Malaysia, the defendants would have no way of recovering their costs should the plaintiffs fail in their claims. The Senior Assistant Registrar allowed the defendants' application and the plaintiffs appealed.

The plaintiffs submitted that they had rented a house for the purpose of staying in Malaysia until the conclusion of the suit, and for that purpose they had been granted to stay in Malaysia by both the office of the Deputy Prime Minister and the immigration department. They were resident in Malaysia when the suit was filed, and had continued to remain so. It was thus for the defendants to prove to the satisfaction of the court, that the plaintiffs were ordinarily out of the jurisdiction.

Held:

[1] The Rules of the High Court 1980, O. 23 r. 1(1)(a) provides that the court may order the plaintiff to give such security for the defendant's costs of the action, if on the application of a defendant to the action, it appears that the plaintiff is ordinarily resident out of the jurisdiction and if the court thinks it just to do so. The granting of such security for costs is a discretionary remedy.

[2] Security for costs cannot be ordered as of right from a foreign plaintiff, but only if the court thinks it just to order, depending on the circumstances of the case. In the instant case, the plaintiff had rented premises and had been given extensions and approval by the Malaysian government and the immigration authorities, to stay in Malaysia because of the case. There was also a mitigating factor against the granting of security for costs, as the plaintiff's predicament and impecuniousity had been brought about by the action of the defendants. Therefore, the court ought to exercise its discretion against the grant of an order for security for costs.

[3] Resident or residence denote a person's home, and ordinarily resident would signify what he would ordinarily or naturally or usually do in the course of his life, whilst being a resident therein. It is possible for a person to have homes in several countries, but when he stays in one particular country for a purpose, he is ordinarily resident in that country.

[3a] The plaintiffs had set up a home in Malaysia and had been doing all the things that a family would do, when it had set up home in Malaysia. Therefore in that sense, the plaintiffs were ordinarily resident in Malaysia and not out of the jurisdiction. The plaintiffs had filed proceedings to vindicate and exculpate themselves, and for that they had to be in Malaysia, and when the suit was filed they were oridinarily resident in Malaysia.

[Appeal allowed with costs.]

Cases referred to:
Commissioners of Inland Revenue v. Lysaght [1928] AC 34 ***(refd)***
Kasturi Palm Products v. Palmex Industries Sdn Bhd [1986] 2 MLJ 310 ***(refd)***
Shah v. Barnet London Borough Council [1983] 1 All ER 226 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 23 r. 1(1)(a)

For the plaintiffs - Tunku Alina Alias (Andrew Teh with her); M/s Wong Lu Peen & Tunku Alias
For the defendants - Collin Sequerah; M/s Zain & Co

Reported by Eugene Ong

JUDGMENT

RK Nathan JC:

The plaintiffs are citizens of the Philippines and presently reside in Malaysia. They established a company called Syarikat Antarabangsa Minar (SAM) and were licensed by their Government to act as an agent to supply Filipino workers to Malaysia. The plaintiffs contend that by way of a letter dated 1 July 1995 the 1st defendant requested from the plaintiffs a supply of 490 Filipino workers for the defendants for their projects. The defendants also agreed that they would provide for an air ticket from the Philippines to Malaysia for each worker selected by the plaintiffs.

Pursuant to the said request the plaintiffs proceeded to advertise for workers both in the newspapers and through the radio and with the assistance of the personnel from the defendants were able to recruit 121 workers. The 2nd defendant then made the necessary application with the Malaysian immigration authorities for the work permits for the said workers.

The 2nd defendant having obtained the approval from the immigration department forwarded to the plaintiffs the said approval letter together with all other relevant documents to enable the plaintiffs to obtain the relevant medical clearance and exit permit and the visa application from the Malaysian Embassy in Manila for the said workers. The workers then resigned from their respective employments to prepare themselves for their departure to Malaysia.

Having completed all that was required of them the plaintiffs then requested from the defendants for the air tickets for the workers. However, the tickets were not forthcoming. As a result the plaintiffs contended that they suffered heavy losses.

Upon reports made by the workers against the plaintiffs, the plaintiffs were investigated by the Philippine National Bureau of Investigations on a charge of illegal recruitment and were accused of sabotaging the country's economy. The plaintiffs contended that based on the laws of the Philippines a charge of economic sabotage if proved merits life imprisonment. Further their licence to operate was terminated. The plaintiffs submitted that they had to meet the loss sustained by the workers which amounted to RM500,000 and that both the plaintiffs feared for their safety and that of their family.

Since the plaintiffs had lost their opportunity to collect agency fees the plaintiffs made various claims against the defendants for damages under various heads. For the purpose of this appeal I need not go into the various claims made.

Having entered their defence the defendants filed an application (encl. 6) seeking security for costs of RM750,000 and that until such security is provided all proceedings be stayed. The learned senior assistant registrar who heard this application made an order on 29 October 1996 granting security for costs of RM50,000 and that the costs of the said application be costs in the cause. The plaintiffs being dissatisfied with the said decision appealed before me.

Defendants' Case For Security For Costs

The defendants argued that since the plaintiffs were not ordinarily resident in Malaysia as pleaded in the statement of claim and since the plaintiffs had indicated that they were being investigated under the laws of the Philippines and that the licence to act as an agent granted by the Philippines Government had been revoked, all of these factors clearly showed the plaintiffs' intention of remaining citizens of the Philippines.

In reply the 1st plaintiff affirmed an affidavit (encl. 7) both on his behalf and on behalf of the 2nd plaintiff, his wife. He averred that the cause of the investigations against them was due to the conduct of the defendants in failing to remit the travel tickets for the 121 Filipino workers who lodged complaints against the plaintiffs. They also feared for their safety and so they came to Malaysia in March 1996 to institute these proceedings against the defendants. They averred that they have been granted a certificate from the office of the Deputy Prime Minister of Malaysia dated 27 April 1996 to enable them to reside in Malaysia on a month to month visitor's pass and that the immigration department has extended their social visa each time they applied for same. The plaintiffs exhibited copies of the said letter dated 27 April 1996 and their passports showing the extension granted. The 1st plaintiff had also rented an apartment at No. 23, 3rd Floor, Ayers Towers, Taman Kosas, Kuala Lumpur, for a period of one year and pointed out that this was an indication of his intention to reside in Malaysia until this case is concluded, so that they could clear both their names in the Philippines. The defendants replied by asserting that the plaintiffs have no assets in Malaysia and feared that in the event the plaintiffs' claim was dismissed with costs, there was no way in which the defendants could recover their costs.

Plaintiffs' Case Against Security For Costs

On appeal the plaintiffs argued that in effect they were ordinarily resident within the jurisdiction. It was submitted to me that the defendants would have to prove to the satisfaction of this court that the plaintiffs were "ordinarily resident out of the jurisdiction". It was pointed out to me that it was a question of fact that when the suit was filed the plaintiffs were resident in Malaysia and had continued to remain so.

Court's Findings

Security for costs is governed by O. 23 r. 1(1) of the Rules of the High Court 1980 (the RHC) and the relevant sub-rule is (1)(a) which reads:

> (1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the court -
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> (a) that the plaintiff is ordinarily resident out of the jurisdiction; or
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> then, if, having regard to all the circumstances of the case, the court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

It is trite law that in matters relating to security for costs the onus is on the defendant to prove the facts on which his application is founded. It is also trite law that the granting of the security for costs is a discretionary remedy. The defendants contend that the plaintiffs have no assets in Malaysia. Neither have the plaintiffs shown if they have any assets in the Philippines. However, to my mind one factor that militates against the granting of security for costs in this case is the allegation of the plaintiffs that their present predicament is due to the refusal of the defendants to send the tickets for the 121 Filipino workers. Without having to go into the merits of the case for the purpose of this application, it is sufficient for me to consider the fact that the defendants have not denied that they had not sent the tickets. They contend in their defence that their representative was working outside the scope of his employment when he placed the order for the workers. Having regard to the pleadings I have to consider if it is just for me to order for security for costs. I find it a serious matter for consideration that the plaintiffs' predicament and impecuniosity had been brought about by the action of the defendants.

I do not think that it ought to be an inflexible and rigid rule that every foreign plaintiff ought to provide security for costs. In the face of the blistering pace set by the country's economic growth and in line with the aspirations of the Government to titillate further the growth of the nation, foreign companies and individuals are flocking to this country to jointly take the nation to the new millennium. If every foreign investor having a legitimate grievance or cause of action against a citizen is required to provide security and in the manner sought by the present defendants in the sum of RM750,000 investors' confidence will slacken and a picture of over protection of its citizenry might seem to be painted. This is not what is intended by the discretionary power vested in O. 23 r. 1(1) of the RHC. In fact in *Kasturi Palm Products v. Palmex Industries Sdn Bhd* [1986] 2 MLJ 310 Mohamed Dzaiddin J (as he then was) expressed similar sentiments when he held that under O. 23 r. 1(1) of the RHC

security for costs cannot now be ordered as of right from a foreign plaintiff but only if the court thinks it just to order depending on the circumstances of the case. In fact in that case the plaintiff firm was carrying on business in Bangalore, India. Its managing partner, an Indian national, was also residing there. The plaintiff was seeking to enforce the award of an arbitration adjudicated by the arbitrators in London. The defendants in contesting the legality of the arbitration award were seeking to enforce security for costs. Unlike the *Kasturi* case the plaintiffs in the instant case are residing in Malaysia. They have rented premises and have been given extensions and approval by the Malaysian Government and the immigration authorities to stay in Malaysia because of this case. Surely this is a clearer case than the *Kasturi* case where I ought to exercise my discretion against the grant of an order for security for costs.

Meaning Of "Ordinarily Resident"

In *Commissioners of Inland Revenue v. Lysaght* [1928] AC 34 the House of Lords in relation to a case under the Income Tax Act 1918 held that no special or technical meaning ought to be attached to the terms "resident" and "ordinarily resident". They were of the view that whether a person is resident or ordinarily resident was essentially a question of fact. I am of the view that in the *Kasturi* case *(supra)* the plaintiff was ordinarily resident outside the jurisdiction. To my mind, resident or residence both being nouns denote a person's home. And ordinarily resident would signify what he would ordinarily or naturally or usually do in the course of his life whilst being a resident therein.

There must be a purpose for the inclusion of the word "ordinarily" resident in the Rules.

It is possible for a person to have a home in, say, the United Kingdom, a home in Australia, and a home in Singapore. To my mind when that person takes time off to spend time and stay in any of that country he is then ordinarily resident in that country. Similarly the plaintiffs in this case have set up a home in Kuala Lumpur and are doing all things that a family would do when it has set up its home in Kuala Lumpur. In that sense the plaintiffs are ordinarily resident in Malaysia and not out of the jurisdiction. They are no doubt Filipino citizens but they are ordinarily resident in Malaysia with the consent and permission of the Government of Malaysia and the immigration department. The plaintiffs are compelled by the exigencies of having to file proceedings in this country and to vindicate and exculpate themselves and for these purposes they have to be ordinarily resident here; in other words there must be a settled purpose. I am fortified in the meaning I

have ascribed to the phrase "ordinarily resident", when I refer to *Shah v. Barnet London Borough Council* [1983] 1 All ER 226 where the House of Lords held that the natural and ordinary meaning of the phrase a person was "ordinarily resident" in the United Kingdom is that he is habitually and normally residing lawfully in the United Kingdom from choice and for a settled purpose throughout the prescribed period, apart from temporary or occasional absences. Furthermore, a specific and limited purpose, such as education, could be a settled purpose. The court further held that it was irrelevant that the applicant's permanent residence or "real home" might be outside the United Kingdom or that his future intention or expectation might be to live outside the United Kingdom. Whilst no person can at any time have more than one domicile there certainly is no limit to the number of residences he can have.

One further fact that I ought to consider is that when the suit was filed the plaintiffs were ordinarily resident in Malaysia. Whilst it is undoubtedly the onus of the defendants to establish the fact that the plaintiffs are ordinarily resident outside the jurisdiction, in my considered judgment I find that the defendants have failed to establish this fact. I therefore allowed the appeal with costs.